No. 75-1048

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT CHEVOOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Washington, D.C. 20530.

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Petitioner contends that evidence of his allegedly perjured testimony before a grand jury should have been suppressed, and the resulting perjury indictment dismissed, because the government's attorney cautioned him to be truthful but did not inform him of his right to invoke the privilege against self-incrimination.

In March 1974, petitioner was indicted in the United States District Court for the District of Massachusetts on three counts of making false declarations before the grand jury, in violation of 18 U.S.C. 1623. The district court granted petitioner's motion to suppress his grand jury testimony and to dismiss the indictment (Pet. App. A; 392 F. Supp. 436), and the court of appeals reversed (Pet. App. B; 526 F. 2d 178).

1. The facts adduced at the suppression hearing are succinctly set forth in the opinion of the court of appeals as follows (Pet. App. B 38-39; 526 F.2d at 179):

> In January, 1973, an intensive government investigation was launched into alleged gambling and loansharking by one Michael Pellicci, activities for which he was subsequently indicted. This effort involved the use of undercover agents and of court-authorized interceptions of wire and oral communications. From these sources, the government obtained evidence which indicated that [petitioner] Chevoor was a victim of Pellicci's loansharking, owed Pellicci $7,000, was being pressed to do political favors for Pellicci, and also was involved in the repayment by a third party of a larger loan to Pellicci. Particularly damning in the government's view was an intercepted December 9 1973 conversation between Pellicci and Chevoor in which "payments" by the alleged third party were discussed.
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> On the evening of January 8, 1974, two F.B.I. agents went to Chevoor's house to serve upon him a subpoena calling for his appearance before the grand jury on January 9. Prior to serving the subpoena, agent Vaules told Chevoor that he was not a grand jury target, but that the grand jury was investigating Pellicci, and he asked Chevoor a number of questions about his association with Pellicci, including whether Chevoor owed Pellicci money or knew about others who did. Chevoor answered these questions in the negative. The district court subsequently found that his responses were clearly inconsistent with the transcript of the December 9 intercepted conversation. The district court also found that during the course of this meeting, the F.B.I. agent told Chevoor that he "had to testify", or at least "had to appear", before the grand jury.

> The subpoena (and the agent) directed Chevoor to report the next morning to Strike Force attorney Friedman in connection with his grand jury appearance. Friedman told Chevoor that the grand jury was investigating Pellicci's loansharking, and that Chevoor was not a target, but that he could expect to be prosecuted if he gave false testimony before the grand jury. Then, with a transcript of the December 9 conversation before him (not identified as such to Chevoor), Friedman questioned Chevoor about whether he had ever borrowed money from Pellicci, whether he owed money to Pellicci, whether he knew others who did, and whether he had ever discussed with Pellicci repayments of such loans. Chevoor again responded negatively. Friedman said he knew Chevoor was not cooperating and not telling the truth; Chevoor asked in what respects this was so. Vaules (who was there throughout this interview) interrupted: "We are not going to tell you what we have on you." Despite this pressure, Chevoor did not change his story. The district court found that on the way to the grand jury room, Friedman told Chevoor that he "just got six or seven guys like you for perjury" in New York or New Jersey.
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> Before the grand jury, the same questions, among others, were asked, and the same negative responses given by Chevoor. His later indictments were for material false statements with respect to whether Chevoor had ever owed money to Pellicci; whether he had ever discussed with Pellicci payments due to the latter; and whether he had ever discussed with Pellicci the fact that other individuals owed Pellicci money.

2. The district court concluded in view of the "totality" of circumstances that it had been fundamentally unfair to question petitioner before the grand jury without having first apprised him of his "right to remain silent" (Pet. App. A 31; 392 F. Supp. at 442). Unbeknownst to petitioner, a conversation between him and Pellicci had been intercepted, and petitioner's statements to the F.B.I. agents and the Strike Force attorney were inconsistent with the information disclosed by the intercepted conversation. In the district court's view, petitioner was therefore liable to prosecution under 18 U.S.C. 1001 at the time he appeared before the grand jury.[1] The district court therefore concluded that petitioner was a target of the grand jury investigation and that the government's contrary representation had been misleading (Pet. App. A 29-31; 392 F. Supp. at 441-442).

Because petitioner had reiterated the statements which the government had reason to believe were false immediately prior to his appearance before the grand jury, and because government counsel had expressly warned petitioner that he could expect to be prosecuted for perjury if he persisted in those responses before the grand jury, the district court also reasoned that the government's sole purpose in taking him before the grand jury was to obtain a perjury indictment against him (Pet. App. A 31-32; 392 F. Supp at 442). It concluded that if petitioner testified truthfully before the grand jury, he could be

[1] 18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

prosecuted for violating 18 U.S.C. 1001; and that if he testified falsely, he could be prosecuted for perjury. In these circumstances, he should not have been "compelled to testify before the grand jury without at least having been told of his right to remain silent" (Pet. App. A 31; 392 F. Supp. at 442).

In a comprehensive analysis upon which we principally rely, the court of appeals correctly held that petitioner was neither a target of the grand jury's investigation nor a prospective defendant arguably entitled to some advice of rights prior to being questioned before the grand jury. Contrary to petitioner's contention (Pet. 9-13), the court's decision does not turn upon rejection of the district court's findings of fact.

The court of appeals held (Pet. App. B 44-48; 526 F.2d at 182-184) that petitioner's responses to questions posed by F.B.I. agents and government counsel did not come within the ambit of 18 U.S.C. 1001 and that nothing in the record indicated that either the government or petitioner contemplated the possibility of a prosecution under that statute. Thus, the court found the predicate for the district court's conclusion that petitioner was a target—that is, the conclusion that petitioner may have violated 18 U.S.C. 1001—lacking in substance as a matter of law (*ibid.*). It was on the basis of this legal conclusion—and not, as petitioner suggests, by a rejection of the district court's factual findings—that the court of appeals held petitioner not to have been a target or prospective defendant before the grand jury. It followed from this determination that petitioner had not been mislead by the government when he was told that he was not a target of the grand jury's investigation (Pet. App. B 48; 526 F. 2d at 184). The court of appeals accordingly found it unnecessary to reach the questions "whether, when, and what warnings should be

given 'target' grand jury witnesses" (Pet. App. B 44; 526 F. 2d at 182).[2]

This analysis disposed of petitioner's claim that he was, in the words of the district court, faced with a "classic Hobson's choice" either to perjure himself or give grand jury testimony inconsistent with his prior statements, thereby subjecting himself to indictment under 18 U.S.C. 1001 (Pet. App. A 27-28; 392 F. Supp. at 440). Indeed, as his testimony at the suppression hearing indicates, petitioner did not perceive himself to be subject to such a dilemma (Pet. App. B 49; 526 F. 2d at 185). He testified that he had not lied, and therefore (*ibid.*):

> [H]e was not guilty of a substantive offense. Any choice to commit perjury was of his own making, not the result of a dilemma created by the government. This course, and the third alternative of risking contempt through silence, confronted Chevoor no more than the average citizen called before the grand jury. Without liability under § 1001, Chevoor was a mere witness, not any sort of a defendant; he therefore had no right to warnings, and the agent's indication that he "had to testify" was entirely accurate.

3. The court of appeals also correctly rejected petitioner's contention that he had been improperly called before the grand jury for the sole purpose of establishing grounds for a perjury indictment. As it explained (Pet. App. B 49-50; 526 F. 2d at 185):

> Unlike *Brown* v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957), where such a defense was successful, the grand jury here was conducting a legitimate

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[2]It is thus unnecessary to hold this case pending a decision in *United States* v. *Mandujano*, No. 74-754, argued November 5, 1975.

investigation into crimes which had in fact taken place within its jurisdiction. *See LaRocca* v. *United States*, 337 F.2d 39, 42-43 (8th Cir. 1964); *but cf. United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo. 1963). It is true that the government did not entirely cooperate with Chevoor, but it is not required to do so. It did not ensnare Chevoor into committing perjury: both Vaules the night before and Friedman prior to the grand jury appearance warned Chevoor that they had reason to believe he was lying, and Friedman added that if he committed perjury in the grand jury he could expect to be prosecuted for it. Moreover, it was possible (even though unlikely) that when it came to the crunch of testifying under oath, with a transcript, Chevoor would succumb to the truth. We cannot say that calling Chevoor in these circumstances even in the anticipation that he would perjure himself is beyond the pale of permissible prosecutorial conduct. *See United States* v. *Nickels*, 502 F.2d 1173, 1176 (7th Cir. 1974). Nor does this reach the level of inexcusable instigation condemned in *United States* v. *Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U.S. 913, 74 S. Ct. 476, 98 L. Ed. 1069 (1954).

> It is obvious that if Chevoor had admitted knowledge of Pellicci's loansharking activities, his testimony could have been a fruitful source of leads for the investigation. It would be anomalous to rule that his criminal intent should be permitted to thwart that investigation.

Moreover, the grand jury subpoena issued before the government had any reason to believe that petitioner might perjure himself.

The logical thrust of petitioner's argument is that the grand jury is foreclosed from compelling the appearance of any prospective witness who is likely to commit perjury. Such a rule would be intolerable, since, as the court of appeals observed, the witness's criminal intent would thereby serve to thwart a legitimate grand jury investigation. It is this rationale, and not a different assessment of the facts, that explains the court of appeals' reversal of the district court.

There is no impropriety in compelling a witness to appear and testify pursuant to a lawful subpoena, even though the government may suspect that the witness will commit perjury. It is proper to subject such a witness to the requirement of testifying on the record under oath, so that he himself can choose between the truth and the sanctions for perjury. Cf. *United States* v. *Jordano*, 521 F. 2d 695, 697 (C.A. 2); *United States* v. *Burket*, 480 F. 2d 568, 572 (C.A. 2). In this way those sanctions, which assure the public's "right to every man's evidence" (*Branzburg* v. *Hayes*, 408 U.S. 665, 682, 688) will retain their effectiveness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.